No. B295935

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

CITY OF SANTA MONICA,

Petitioner-Defendant,

v.

PICO NEIGHBORHOOD ASSOCIATION; MARIA LOYA,

Respondents and Plaintiffs.

PETITION FOR WRIT OF SUPERSEDEAS OR OTHER EXTRAORDINARY RELIEF; MEMORANDUM OF POINTS AND AUTHORITIES

Appeal from the Superior Court for the County of Los Angeles
The Hon. Yvette M. Palazuelos, Judge Presiding
Superior Court Case No. BC616804
Department 9 Telephone: (213) 310-7009

Gov't Code, § 6103

IMMEDIATE STAY REQUESTED
(*of order prohibiting Council members from serving after August 15, 2019, which calls for compliance starting on or before April 1, 2019*)

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

In this California Voting Rights Act case, the trial court entered a judgment mandating, in paragraph 9, that as of August 15, 2019, the City of Santa Monica must oust all of its duly elected Council members from office—leaving the City with no choice but to hold an election this summer to ensure that there is a new Council in place to run the City. The City has appealed, effectuating an automatic stay of paragraph 9 under section 916 of the Code of Civil Procedure. But the trial court has refused to confirm that a stay is now in place. And plaintiffs have taken the position that paragraph 9 is merely prohibitory, so it is *not* stayed during this appeal, and that if the City does not comply with it, "there will be consequences." (Vol. 5, Ex. GG, p. 1121, fn.2.)

Paragraph 9 provides: "Any person, other than a person who has been duly elected to the Santa Monica City Council through a district-based election in conformity with this Judgment, is prohibited from serving on the Santa Monica City Council after August 15, 2019." This is indistinguishable from many other injunctions that the Supreme Court and Courts of Appeal have found to be mandatory in effect—and thus automatically stayed on appeal—even if prohibitory in form, because they coerce a change to the status quo. (See, e.g., *Paramount Pictures Corp. v. Davis* (1964) 228 Cal.App.2d 827, 838.) Here, the enforcement of paragraph 9 will have a dramatic, irreparable impact on the status quo and the electoral process in Santa Monica. It requires the City to strip its current Council members of their elected positions, scrap an at-large election system that has been in place for

more than seven decades, and hold an election this summer under a brand-new, court-imposed district-based system. Plaintiffs have emphasized that paragraph 9 *requires* a fundamental change to the status quo, and that if the City refuses to disband its current Council and hold an election before August 15, "the Governor will do it for them. He will order an election. *We are not talking about them not having an election*. They have time to do it. *They will do it.* They just don't want to do it." (Vol. 5, Ex. II, p. 1184:18-21, italics added.)

Under the circumstances, in light of the plaintiffs' position that paragraph 9 is not presently stayed and the trial court's refusal to clarify this issue, the City respectfully requests that this Court issue a writ of supersedeas in a corrective capacity, confirming that paragraph 9 of the trial court's judgment is a mandatory injunction and was automatically stayed by the City's filing of its notice of appeal.[1]

Alternatively, if the Court concludes that paragraph 9 is prohibitory in effect as well as form, and therefore not automatically stayed on appeal, this Court should exercise its discretion to stay the enforcement of paragraph 9 during the appeal to avoid irreparable harm to the City, its Council members, and the public. Among other things, the enforcement of paragraph 9 could leave the City without any governing body for some period of time;

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[1] The parties and the trial court agree that paragraph 8 of the judgment, which expressly calls for a district-based election to be held on July 2, 2019, is stayed automatically as a result of the City's appeal. (See Vol. 5, Ex. II, p. 1189:14-16.)

would compel the City to adopt the very method of election and districting plan whose necessity and legality are the subjects of this appeal; would rob the current Council members of the seats they spent time and energy campaigning for and winning; would deprive voters, including Latino voters, of their preferred representatives; and would cost the City almost $1 million in unrecoverable election-related costs.

Finally, the City requests that this Court either issue a decision on this petition before April 1 (the date when the Council would need to pass a resolution calling for an election to occur in late July) or push back the August 15, 2019, deadline in paragraph 9. Elections must be noticed approximately four months in advance, and without either temporary or permanent relief from this Court, the City would be forced to notice a district-based election in early April. (See Vol. 5, Ex. GG, p. 1135, ¶¶ 5(a)–(c).)

II. PETITION FOR WRIT OF SUPERSEDEAS OR OTHER EXTRAORDINARY RELIEF; REQUEST FOR STAY

A. Parties

1. Petitioner, the City of Santa Monica, was the defendant in the underlying action (Los Angeles Superior Court case number BC616804).

2. Respondents, who were the plaintiffs in the underlying action, are the Pico Neighborhood Association and Maria Loya.

B. Factual background

3. Santa Monica is a small, progressive, and inclusive

city. In 1946, the City adopted its current Charter, which calls for the "at-large" election of seven Council members. (See Vol. 2, Ex. E, p. 291.) Each voter may cast up to three votes in gubernatorial election years and up to four votes in presidential election years for candidates of his or her choice. Every voter thus has a say as to who sits in each seat on the Council, and Council members are accountable to every voter.

4. The City's most prominent minority leaders backed the adoption of the current electoral system in the 1946 Charter (see Vol. 5, Ex. BB, p. 1079, ¶ 70), in large part because that system made it more likely that minorities could elect candidates of their choice. The 1946 Charter also featured other provisions that were highly favorable to minorities, including an explicit prohibition against racial discrimination in public employment. (Vol. 4, Ex. X, p. 864.) Not surprisingly, there is no record of any minority residents opposing the 1946 Charter. (*Id.*, p. 931.)

5. Santa Monica voters have twice, in 1975 and in 2002, overwhelmingly rejected proposals to drop the at-large method of election in favor of a districted electoral scheme. (See Vol. 2, Ex. E, pp. 294, 297.) And they did so for sound, "good government" reasons that had nothing to do with race. Under a districted system, each voter would be able to vote only once every four years, and for only one seat on the Council—the one assigned to the particular district in which that voter lives. A Council member under such a system would be directly accountable only to his or her district, not the City as a whole, and voters feared that such Council members would succumb to horse-trading and parochialism.

6. The at-large system has served the City well for 73 years. Council elections are hotly contested, with typically over a dozen candidates running for office, and voter participation is high. The candidates elected as a result of these competitive races represent and are accountable to every last resident in the City. And, critically, under the current at-large election system, candidates preferred by Latino voters have consistently prevailed at the polls, notwithstanding the fact that Latinos presently make up only 13.6 percent of the City's voting population. (See Vol. 2, Ex. E, pp. 303–314.)

C. Procedural background

7. Plaintiffs filed this action on April 12, 2016 (see Vol. 1, Ex. A, pp. 9–25), and filed the operative complaint on February 23, 2017 (see Vol. 1, Ex. B, pp. 27–48). Plaintiffs alleged that the City amended its Charter in 1946 to discriminate against minority voters, in violation of the Equal Protection Clause of the California Constitution, and that the City's at-large electoral system prevents Latino voters from electing candidates of their choice, in violation of the CVRA. (*Ibid.*)

1. The court trial and subsequent proceedings

8. The court trial in this case began on August 1, 2018. The trial lasted for six weeks, concluding on September 13, 2018.

9. The parties then submitted closing briefs and proposed verdict forms, with plaintiffs' opening papers filed on September 25, 2018 (Vol. 1, Ex. C, pp. 50–160 (original); Vol. 1, Ex. D,

pp. 162–257 (corrected)), the City's papers filed on October 15, 2018 (Vol. 2, Ex. E, pp. 266–339), and plaintiffs' reply filed on October 25, 2018 (Vol. 2, Ex. F, pp. 341–355).

10. In its closing brief, the City argued, among other things, that Santa Monica's elections are not characterized by racially polarized voting, because Latino-preferred candidates are not usually defeated by white bloc voting; that the City's at-large electoral system does not dilute Latino voting power, because no hypothetical alternative system would enhance Latino voters' ability to elect candidates of their choice; and that neither the adoption of the City's current Charter in 1946 nor the Council's decision in 1992 not to put a districting measure on the ballot was motivated by racial discrimination. (See Vol. 2, Ex. E, pp. 266–339.) With respect to plaintiffs' Equal Protection claim, the City argued that plaintiffs' factual allegations were false and, even if they were true, would not be enough as a matter of law to show that the relevant decisionmakers affirmatively intended to discriminate against minority voters. (*Id.* at pp. 289–297.)

11. On November 8, 2018, the trial court issued a tentative decision stating only that it had found in favor of plaintiffs on both causes of action, without any reasoning or citations to evidence or case law. (See Vol. 2, Ex. H, pp. 363–364.) The court also instructed the parties to submit further briefing in advance of a hearing "regarding the appropriate/preferred remedy for violation of the California Voting Rights Act." (See *id.* at p. 364.)

12. The City timely filed a request for a statement of decision on November 15, 2018. (See Vol. 2, Ex. I, pp. 366–378.)

13. The parties filed briefs on remedies. (Vol. 2, Ex. J, pp. 380–420; Ex. N, pp. 488–520; Ex. O, pp. 522–536).

14. In their brief concerning remedies, plaintiffs contended that the trial court should order the City to hold an election by April 16, 2019, and also "[p]rohibit anyone not duly elected through a district-based election from serving as a member of the Santa Monica City Council after May 14, 2019." (Vol. 2, Ex. J, p. 384.) Plaintiffs also urged the Court to adopt the seven-district map drawn by their expert witness. (See *id.* at pp. 387–388.)

15. In its brief concerning remedies, the City argued, among other things, that if the court entered judgment in favor of the plaintiffs, it should "disregard plaintiffs' contrived deadlines for holding a special election" and "should instead issue an order that is to be carried out only once any judgment against the City is final, with appellate rights exhausted." (Vol. 2, Ex. N, p. 500.) The City noted that "any order requiring the City to hold a special election or otherwise depart from the status quo would necessarily be mandatory in character, and thus stayed on appeal." (See *id.* at p. 498.) The City also contended that any order prohibiting council members not elected through district-based elections would, "despite its prohibitory label, . . . be mandatory in effect . . . and therefore would be automatically stayed on appeal." (*Id.* at pp. 498–499 n.7.)

16. The City also argued that if any remedy were necessary, the court should order the City to fashion such a remedy subject to judicial approval for three reasons. (See *id.* at pp. 500–505.) First, California law requires as much. (See *id.* at pp. 504–

505.) When a court orders a change from at-large elections to district-based elections, section 10010 of the Elections Code calls for a process of public input on potential district lines. Second, Santa Monica is a charter city and should be allowed to fashion its own proposed remedy, subject to judicial oversight. (See *id.* at p. 503.) Third, federal courts adjudicating statutory vote-dilution claims generally do not design remedies in the first instance and instead leave that task to the relevant legislative body, subject to judicial review. (See *id.* at pp. 503–504.)

17. On November 26, 2018, plaintiffs filed an ex parte application seeking a temporary restraining order prohibiting the City from certifying the results of its November 2018 City Council election. (See Vol. 2, Ex. K, pp. 422–446.) The trial court denied plaintiffs' ex parte application on November 27, 2018. (See Vol. 2, Ex. M, p. 478:24-25.)

18. On December 12, 2018, the court issued a first amended tentative decision. (See Vol. 3, Ex. Q, pp. 594–596.) In addition to the single sentence finding in favor of plaintiffs on both causes of action, the court issued two orders. First, it "enjoin[ed] and restrain[ed] Defendant from imposing, applying, holding, tabulating, and/or certifying any at-large elections, and/or the results thereof, for any positions on its City Council." (*Id.* at pp. 594–595, ¶ 2.) Second, it ordered all City Council elections to "be district-based elections, . . . in accordance with the map attached hereto," which was plaintiffs' trial exhibit 162 depicting a single "Pico Neighborhood District." (*Id.* at p. 595, ¶ 3.)

19. On the same day, the court ordered plaintiffs to file a

proposed statement of decision and proposed judgment by January 2, 2019. (Vol. 3, Ex. R, p. 598.)

20. On December 21, 2018, the City filed a second request for a statement of decision, in light of the court's additional findings on remedies in its amended tentative decision. (Vol. 3, Ex. S, pp. 600–631.)

21. On January 2, 2019, plaintiffs filed an ex parte application for clarification of the court's December 12 order. (Vol. 3, Ex. T, pp. 633–653.) Plaintiffs noted that the map attached to the order defined only one district, not the seven drawn by their expert, and that the court did not specify when district-based elections would be held, or what seats would be subject to election first. (*Id.* at pp. 637–639.)

22. In its opposition, the City reiterated its contentions that the court was obligated under section 10010 of the Elections Code to give the City the opportunity to draw districts in the first instance after soliciting public input, and that any order calling for a special election before the next regularly scheduled general municipal election (in November 2020) would be a mandatory injunction and therefore automatically stayed upon the taking of an appeal. (Vol. 3, Ex. U, pp. 657, 659.)

23. At the hearing on plaintiffs' ex parte application, held on January 2, 2019, the court directed plaintiffs to propose a statement of decision and judgment calling for the seven districts drawn by plaintiffs' expert and a special election in 2019. (See Vol. 3, Ex. V, p. 703:9-11.) The court concluded the hearing by stating, "We will let it run and see where it goes in the Court of

Appeal." (*Id.* at p. 703:11-12.)

24. On January 3, 2019, plaintiffs filed a proposed statement of decision that closely followed the content of their closing brief and a proposed judgment that (a) called for a special district-based election for all seven council seats to be held on July 2, 2019, (see Vol. 3, Ex. W, p. 715), with the districts being those drawn by plaintiffs' expert, and (b) prohibited "any person, other than a person who has been duly elected to the Santa Monica City Council through a district-based election in conformity with this judgment, . . . from serving on the Santa Monica City Council after August 15, 2019." (*Ibid.*)

25. Because the proposed statement and proposed judgment were in almost every respect contrary to the factual record and the law, the City timely objected (on January 18, 2019) at great length to both. (See Vol. 4, Ex. X, pp. 772–988.) Among many other things, the City contended that any order of a special election would be automatically stayed by the taking of an appeal, as would any order prohibiting Council members other than those elected by districts from serving past a certain date, as such an order would be prohibitory in form but mandatory in effect. (See *id.* at p. 775.)

2. The judgment, the City's appeal, and the City's efforts to seek confirmation of the automatic stay

26. On February 13, 2019, the trial court (a) overruled all of the City's objections to the proposed judgment in an order con-

taining no reasoning or citations (Vol. 5, Ex. CC, p. 1100); (b) sustained a handful of the City's objections to the proposed statement of decision, overruling the balance without explanation (Vol. 5, Ex. DD, pp. 1102–1103); (c) issued a statement of decision that was nearly identical to plaintiffs' proposed statement (see Vol. 5, Ex. BB, pp. 1028–1098); and (d) issued a judgment that was substantively identical to plaintiffs' proposed judgment. (Vol. 4, Ex. AA, pp. 1005–1019.)

27. Paragraph 8 of the judgment orders the City to "hold a district-based special election," with district lines drawn by plaintiffs' expert, "on July 2, 2019, for each of the seven seats on the Santa Monica City Council." (See *id.* at p. 1017.)

28. Paragraph 9 of the judgment provides: "Any person, other than a person who has been duly elected to the Santa Monica City Council through a district-based election in conformity with this judgment, is prohibited from serving on the Santa Monica City Council after August 15, 2019." (*Ibid.*)

29. On February 21, 2019, the Santa Monica City Council unanimously resolved to appeal from the judgment.

30. Because the City wished to effect an automatic stay of the trial court's judgment and thereby avoid making arrangements for a district-based election—the deadline for the earliest of those arrangements is approximately four months before the election date—the City filed its notice of appeal the next day, on February 22, 2019. (See Vol. 5, Ex. FF, pp. 1107–1109.)

31. On February 28, 2019, the City filed an ex parte application in the trial court concerning paragraph 9 of the judgment,

which prohibits Council members other than those elected in a district-based system from serving after August 15. (See Vol. 5, Ex. GG, pp. 1111–1152.) The City contended that paragraph 9 is effectively mandatory, because it requires the City to oust its current Council members and to hold a district-based election before August 15. The City therefore sought confirmation that paragraph 9 is automatically stayed on appeal. (*Id.* at p. 1122.) In the alternative, the City requested that the trial court exercise its discretion to stay the enforcement of paragraph 9 pending appeal.

32. Plaintiffs contended in their opposition that paragraph 9 is prohibitory in both form and effect. (See Vol. 5, Ex. HH, pp. 1157–1163.) They argued that the City "could comply with paragraph 9 of the Judgment by holding a district-based election for the seats on its city council, or Defendant could opt to exist with no quorum on its city council"—that is, without any governing body at all. (See *id.* at p. 1162.)

33. At the March 4 hearing on the City's application, plaintiffs also contended, citing Elections Code section 10300, that if the City were to choose not to hold a district-based election before August 15, the voters could petition the Governor to appoint commissioners to call an election, which would need to be district-based. Plaintiffs thus argued that the City's only two options were either to hold a district-based election voluntarily before August 15, 2019, or to be forced to do so by the Governor at some point thereafter. (See Vol. 5, Ex. II, p. 1174:19–1175:20.)

34. The trial court took the matter under submission and issued an order denying the City's application for confirmation on

March 6, 2019, with no reasoning or citations to law. (See Vol. 5, Ex. JJ, p. 1208.) The court also struck, without explanation, the declaration of Dr. Jeffrey Lewis, which the City had submitted with its application to demonstrate that voters, including Latino voters, would suffer irreparable harm from the loss of the representation of their preferred candidates. (*Ibid.*)

35. Just two days after the issuance of the trial court's order, the City files this petition for relief from this Court so that it may preserve the status quo pending appeal and avoid calling a district-based special election that it should not be under any obligation to hold.

D. Statement of the case

36. A petition for writ of supersedeas must show "that substantial questions will be raised upon the appeal." (*Deepwell Homeowners' Protective Ass'n v. City Council of Palm Springs* (1965) 239 Cal.App.2d 63, 66–67; Cal. Rules of Court, rule 8.112(a)(4)(A).) The City's appeal raises substantial questions with respect to both of plaintiffs' causes of action.

37. The CVRA has been addressed in published appellate decisions only three times, and those decisions resolve none of the disputed issues in this case. In fact, the leading CVRA case, *Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660, expressly left unresolved several questions raised in this appeal: (a) "What elements must be proved to establish liability under the CVRA?"; (b) "Is the court precluded from employing crossover or coalition districts (i.e., districts in which the plaintiffs' protected class does

not comprise a majority of voters) as a remedy?"; and (c) "Does the particular remedy under contemplation by the court, if any, conform to the Supreme Court's vote dilution remedy cases?" (*Id.* at p. 690.)

38. The trial court committed numerous legal errors in deciding plaintiffs' CVRA claim, only a few of which are briefly catalogued here.

a. In determining whether the City's elections are characterized by racially polarized voting, the court erred in focusing exclusively on the performance of Latino (or Latino-surnamed) candidates. But it is well settled that minority-preferred candidates need not themselves be members of the protected class. (See, e.g., *Ruiz v. City of Santa Maria* (9th Cir. 1998) 160 F.3d 543, 551 [joining eight other circuits "in rejecting the position that the 'minority's preferred candidate' must be a member of the racial minority"].) If the trial court had properly identified Latino voters' candidates of choice—in part by acknowledging that in multiple elections, white candidates were preferred by Latino voters to an equal or greater extent than Latino candidates—it could not have concluded that Latino-preferred candidates are usually defeated.

b. The trial court erred in concluding that the City's at-large election system has diluted Latino voting power. To prove vote dilution, a plaintiff must show that a protected class would have greater opportunity to elect candidates of its choice under some other electoral system, which serves as a "benchmark" for comparison. "[I]n order to decide whether an electoral system

has made it harder for minority voters to elect the candidates they prefer, a court must have an idea in mind of how hard it 'should' be for minority voters to elect their preferred candidates under an acceptable system." (*Thornburg v. Gingles* (1986) 478 U.S. 30, 88 (conc. opn. of O'Connor, J.).) In Santa Monica, Latino voters account for just 13.6 percent of the voting population (see Vol. 2, Ex. E, p. 273), and would comprise only 30 percent of the voting population in the purportedly remedial district ordered by the court (see Vol. 2, Ex. N, p. 496). Unrebutted testimony demonstrates that the court-imposed districting plan would dilute the voting strength of minority voters in the six other districts—where two-thirds of the City's Latinos reside. (*Ibid.*)

c. If, as plaintiffs have argued and as the trial court's decision suggests, vote dilution is not an element of the CVRA, then the statute must be unconstitutional as applied in this case, to the extent that it authorizes predominantly race-based remedies without a showing of any injury, much less a compelling governmental interest.

d. The trial court adopted the districting plan drawn by plaintiffs' expert, without public input, in violation of section 10010 of the Elections Code. (See Vol. 4, Ex. AA, p. 1019.) That statute requires that a city changing from an at-large method of election to district-based elections—whether doing so voluntarily or, as here, under a court order—must hold a series of public hearings over the boundaries of potential districts. The trial court erred in refusing to allow the City to go through the inclusive, democratic process of public engagement mandated by

law.

e. The trial court erred as a matter of law in concluding that plaintiffs had proven a violation of the Equal Protection Clause. Plaintiffs submitted no evidence, and the court made no findings, demonstrating that the City's electoral system has caused a disparate impact on minority voters—i.e., that some alternative electoral system would have enhanced any minority group's voting strength at any time in the City's history. (E.g., *Johnson v. DeSoto Cty. Bd. of Comm'rs* (11th Cir. 2000) 204 F.3d 1335, 1344.) The fact that few Latinos have served on the Council to date—in addition to being irrelevant, as the focus is on *Latino-preferred* candidates, regardless of their ethnicity—says nothing about how many Latinos *should have* been elected to serve had Latinos voted cohesively throughout the City's history. In addition, the facts found by the trial court do not support its conclusion of intentional discrimination. For example, the court acknowledged that the adoption of the City's current electoral system in the 1946 Charter was favored by every prominent local minority leader, but nevertheless somehow concluded that the Charter (which contained an explicit *anti*-discrimination provision) was motivated by an intent to discriminate against minorities. (See Vol. 5, Ex. BB, pp. 1075, 1079, ¶¶ 65, 70.)

E. Basis for relief

39. Mandatory injunctions are automatically stayed by the taking of an appeal. (Code Civ. Proc., § 916, subd. (a); *Ket-*

tenhofen v. Superior Court (1961) 55 Cal. 2d 189, 191.) "The purpose of the automatic stay provision of section 916, subdivision (a) is to protect the appellate court's jurisdiction by preserving the status quo until the appeal is decided." (*URS Corp. v. Atkinson / Walsh Joint Venture* (2017) 15 Cal.App.5th 872, 881, internal quotation marks omitted.)

40. Where, as here, an appeal effects an automatic stay, "the writ of supersedeas will issue 'in a corrective capacity' in case of a . . . threatened violation of such stay." (*In re Dabney's Estate* (1951) 37 Cal.2d 402, 408; see also *Hedwall v. PCMV, LLC* (2018) 22 Cal.App.5th 564, 572 ["the appropriate method of challenging the denial of an order to enforce the stay arising under section 916 is a petition for writ of supersedeas"]; *Nielsen v. Stumbos* (1990) 226 Cal.App.3d 301, 303 ["Supersedeas is the appropriate remedy when it appears that a party is refusing to acknowledge the applicability of statutory provisions 'automatically' staying a judgment while an appeal is being pursued."].)

41. Here, plaintiffs have refused to acknowledge that paragraph 9 of the judgment is mandatory in effect and therefore stayed on appeal, and they have contended there will be "consequences" if the current Council is not ousted by August 15. The trial court has likewise refused to confirm that the automatic stay applies to paragraph 9. Accordingly, the City has brought this petition for a corrective writ of supersedeas clarifying that paragraph 9 of the trial court's judgment was automatically stayed by the filing of the City's notice of appeal.

42. In determining whether an injunction is mandatory

and therefore automatically stayed on appeal, courts must identify the *substance* of the injunction, regardless of its form. (*URS Corp.*, *supra*, 15 Cal.App.5th at p. 884.) An injunction is "mandatory in effect if its enforcement would be to change the position of the parties and compel them to act in accordance with the judgment rendered." (*Musicians Club of L.A. v. Superior Court* (1958) 165 Cal.App.2d 67, 71.)

43. Paragraph 9 states: "Any person, other than a person who has been duly elected to the Santa Monica City Council through a district-based election in conformity with this Judgment, is prohibited from serving on the Santa Monica City Council after August 15, 2019." (Vol. 4, Ex. AA, p. 1017.)

44. Paragraph 9 is mandatory in effect for two reasons. First, it changes the status quo by compelling duly elected Council members "affirmatively to surrender a position which [they] hold[]," or, presumably, the City to take affirmative action to remove them. (*Clute v. Superior Court* (1908) 155 Cal. 15, 20 [holding injunction was mandatory in effect even though prohibitory in form].)

45. Second, paragraph 9 effectively compels the City to conduct a district-based election in advance of August 15, 2019. The City's Charter assigns all the City's powers to its Council. (§ 605.) If the current Council members cannot continue represent the City after August 15, 2019, then the City will be left without any governing body. To avert that outcome, the City must install new Council members, but the judgment requires that they be elected in a district-based election. And under California law,

any election must be noticed at least 113 days before the election date. (Elec. Code, § 12101.) Accordingly, paragraph 9 effectively requires the City to give notice of an election in short order and to conduct that election in July.

46. Paragraph 9 is analogous to the injunctions entered in many other cases in which the Supreme Court and Courts of Appeal have found relief to be mandatory in effect even if prohibitory in form. (See, e.g., *Feinberg v. Doe* (1939) 14 Cal.2d 24, 29 [order prohibiting employment of non-union worker, "in effect, commands the defendants to release the said employee from their employment"]; *Clute*, *supra*, 155 Cal. at p. 20 [order prohibiting hotel manager from fulfilling duties was mandatory because it "compel[led] him affirmatively to surrender a position which he h[eld]"]; *Davis*, *supra*, 228 Cal.App.2d at p. 838 [order prohibiting actress from filming scenes for other studios tantamount to a mandatory injunction that she film for Paramount]; *Ambrose v. Alioto* (1944) 62 Cal.App.2d 680, 686 [order prohibiting defendant from delivering fish to any canner except one equivalent to an order requiring defendant to deliver to that canner].)

47. In the alternative, if this Court deems paragraph 9 to be prohibitory in effect as well as form, it should exercise its discretion to issue the writ to stay the enforcement of paragraph 9 during the appeal, in order to avoid irreparable harm to the City and the public. (Code Civ. Proc., § 923; e.g., *Mills v. Cty. of Trinity* (1979) 98 Cal.App.3d 859, 861.)

48. For the reasons set out above (¶¶ 38(a)–(e)), the City's appeal raises substantial questions, many of first impression in

California's appellate courts, and the City has a substantial likelihood of prevailing on appeal.

49. Should this Court decline to grant this petition and then later reverse the judgment, the enforcement of paragraph 9 during the pendency of the City's appeal will have worked irreparable harm on the City, its current Council members, and the public. These irreparable harms include:

a. The voters' will would be disregarded. Santa Monica voters have twice rejected a proposal to revert to district-based elections (which were in place in Santa Monica between 1906 and 1914) for entirely non-discriminatory reasons.

b. Relatedly, all Santa Monica voters will lose the candidates that they duly elected to serve until 2020 and 2022—nullifying the fundamental constitutional rights of those voters to have their voices heard in the electoral process. (Cal. Const., art. II, § 2.5 ["A voter who casts a vote in an election in accordance with the laws of this State shall have that vote counted"].)

c. The City would be compelled to hold districted elections this summer, with the district lines drawn by plaintiffs' expert rather than through the public-hearing process mandated by section 10010 of the Elections Code. Going through this process would result in voter confusion and almost $1 million in direct and unrecoverable costs to the City.

d. The court-imposed districts threaten to *dilute* the voting power of the vast majority of Latinos who live outside of the one purportedly remedial district ordered by trial court. The likely result of a district-based election this summer is that the

City goes from its current Council, where most of its members were the preferred candidates of Latinos in the 2016 and 2018 elections, to a new Council that Latinos have had little say in electing.

F. The Court has jurisdiction, and this petition is timely.

50. This Court is authorized to grant a writ of supersedeas. "An appellate court may issue a writ of supersedeas to stay a judgment . . . where an appeal from the judgment or order is pending." (*In re Christy L.* (1986) 187 Cal.App.3d 753, 759; see also *Sun-Maid Raisin Growers of Cal. v. Paul* (1964) 229 Cal.App.2d 368, 374 ["The issuance of a writ of supersedeas . . . is within the inherent power of the court."].)

51. Here, a notice of appeal was filed on February 22, 2019, from a judgment entered on February 13, 2019.

G. Authenticity of exhibits

52. Exhibits A–JJ accompanying this petition are true and correct copies of original documents on file with the trial court or certified reporters' transcripts.

53. Exhibit GG contains three declarations submitted to show the irreparable harm that would be caused if the stay of the trial court's order prohibiting duly elected Council members from serving past August 15, 2019, were not stayed pending this appeal, and the lack of harm to Respondents if a stay is granted. These declarations were filed in the trial court in connection with

the City's application for a stay (and the trial court issued an order striking Dr. Lewis's declaration without explanation).

54. The exhibits are paginated consecutively from page 1 through 1208.

III. PRAYER FOR RELIEF

The City prays that this Court:

1. Issue a writ of supersedeas confirming that paragraph 9 of the trial court's judgment entered on February 13, 2019, was automatically stayed by the City's noticing of an appeal, and that the stay will remain in effect until the appeal is resolved;

2. In the alternative, issue a writ of supersedeas staying paragraph 9 of the trial court's judgment entered on February 13, 2019, and continuing the stay during the pendency of this appeal;

3. Grant any temporary stay of the trial court's judgment pending this Court's determination of this petition (if necessary); and

4. Grant such other relief as is just and proper.

DATED: March 8, 2019

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

By: _____
Theodore J. Boutrous, Jr.

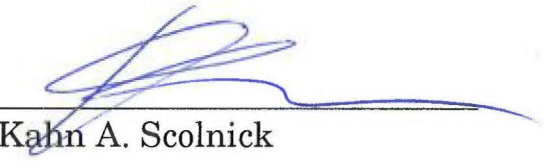
Attorneys for Petitioner-Defendant City of Santa Monica

IV. VERIFICATION

I, Kahn A. Scolnick, declare as follows:

I am one of the attorneys for Petitioner in this matter, and I am authorized to execute this verification on its behalf. I have read the foregoing petition and know its contents. The facts alleged in the petition are within my own knowledge, and I know these facts to be true. Because of my familiarity with the relevant facts pertaining to the trial court proceedings, I, rather than Petitioner, verify this petition.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this verification was executed on March 8, 2019, in Los Angeles, California.

By: 
Kahn A. Scolnick

V. MEMORANDUM OF POINTS AND AUTHORITIES

A. Introduction

Paragraph 9 of the trial court's judgment states: "Any person, other than a person who has been duly elected to the Santa Monica City Council through a district-based election in conformity with this Judgment, is prohibited from serving on the Santa Monica City Council after August 15, 2019." (Vol. 4, Ex. AA, p. 1017.) The trial court refused either to confirm that paragraph 9 is mandatory in effect and therefore automatically stayed on appeal or, in the alternative, to exercise its discretion to stay the enforcement of paragraph 9 so as to avoid irreparable harm to the City, its Council members, and the public. (See Vol. 5, Ex. JJ, p. 1208.)

This Court should issue a writ of supersedeas in a corrective capacity, confirming that paragraph 9 is mandatory in effect because it requires the City to go without a government after August 15—thus forcing the City to change the status quo by holding a district-based election this summer. As a mandatory injunction, paragraph 9 was automatically stayed by the filing of the City's notice of appeal.

In the alternative, this Court should issue the writ in the exercise of its discretion, because without a stay of paragraph 9's enforcement during the appeal, the City, the Council members, and the public will suffer irreparable harm, including the deprivation of voters' constitutional rights to choose their elected officials, and almost $1 million in unrecoverable election-related costs.

B. Standard for granting a writ of supersedeas

Section 923 of the Code of Civil Procedure grants this Court virtually unlimited discretion to issue orders preserving the status quo in protection of its own jurisdiction. (*People ex rel. San Francisco Bay Conservation & Dev. Comm'n v. Town of Emeryville* (1968) 69 Cal.2d 533, 538–539.) "'The right of appeal would be but an empty thing if the appellate court could not, and in proper cases did not, afford to the appellant a means whereby the fruits of victory were fully preserved to him in the event of a reversal of the judgment against him.'" (*Deepwell*, *supra*, 239 Cal.App.2d at p. 66.)

When, as here, an appeal effects an automatic stay, "the writ of supersedeas will issue 'in a corrective capacity' in case of a . . . threatened violation of such stay." (*Dabney's Estate*, *supra*, 37 Cal.2d at p. 408.) "[U]pon a mistaken attempt of the trial court to enforce [an injunction that is mandatory in character], the appellant is entitled as a matter of right to issuance of the writ of supersedeas." (*Food & Grocery Bur. of S. Cal. v. Garfield* (1941) 18 Cal.2d 174, 176–177.) In these circumstances, because "the perfecting of the appeal . . . operates to automatically stay proceedings in the court below, it is unnecessary . . . to balance or weigh the arguments with reference to the possible irreparable injury to appellants or respondents . . . ." (*Feinberg*, *supra*, 14 Cal.2d at p. 29.)

The writ is also available where the injunction at issue is prohibitory in effect. (*City of Pasadena v. City of Alhambra* (1946)

75 Cal.App.2d 91, 98.) The stay of such an injunction is appropriate where (a) the petitioner will suffer irreparable harm absent relief and (b) the petitioner demonstrates that "substantial questions will be raised on appeal." (*Deepwell*, *supra*, 239 Cal.App.2d at pp. 66–67; see also, e.g., *Meyer v. Arsenault* (1974) 40 Cal.App.3d 986, 989; *Wilkman v. Banks* (1953) 120 Cal.App.2d 521, 523.)

C. A corrective writ of supersedeas is necessary to clarify that paragraph 9 of the judgment, though prohibitory in form, is mandatory in effect.

Mandatory injunctions are automatically stayed pending appeal. (Code Civ. Proc., § 916, subd. (a); *Ambrose*, *supra*, 62 Cal.App.2d at p. 686.) The form of the injunction does not determine its effect: "What may appear to be negative or prohibitory frequently upon scrutiny proves to be affirmative and mandatory." (*Byington v. Superior Court* (1939) 14 Cal.2d 68, 70; see also *Davis*, *supra*, 228 Cal.App.2d at p. 835 ["The character of an injunction . . . is determined not so much by the particular designation given to it by the court directing its issuance, as by the nature of its terms and provisions, and the effect upon the parties against whom it is issued."].)

To discern the nature and effect of an injunction, courts assess whether it calls for the disruption of the status quo. "An order enjoining action by a party is prohibitory in nature if its effect is to leave the parties in the same position as they were prior to the entry of the judgment. On the other hand, it is mandatory in

effect if its enforcement would be to change the position of the parties and compel them to act in accordance with the judgment rendered." (*Musicians Club of L.A.*, *supra*, 165 Cal.App.2d at p. 71.)

Paragraph 9 of the judgment states: "Any person, other than a person who has been duly elected to the Santa Monica City Council through a district-based election in conformity with this Judgment, is prohibited from serving on the Santa Monica City Council after August 15, 2019." (Vol. 4, Ex. AA, p. 1017.) This injunction, although prohibitory in form, is mandatory in effect because its enforcement would leave the parties in a dramatically different position than the one they occupied before the judgment issued.

First, paragraph 9 coerces the City to hold a district-based election before August 15, 2019, in accordance with the district map drawn by plaintiffs' expert. If the current Council members cannot continue to serve after August 15, then the City must make arrangements for seven new Council members to take their seats. There is no practical alternative, because the City can be governed only by its seven-member Council. (See Santa Monica City Charter, § 400 [defining powers of City], § 605 ["All powers of the City shall be vested in the City Council"], § 600 [City Council shall consist of seven members].)

Under paragraph 9, the only persons eligible to become Council members after August 15 are those who have "been duly elected to the Santa Monica City Council through a district-based election in conformity with this Judgment." (Vol. 4, Ex. AA, p. 1017.) The City therefore would need to hold a district-based

election. And for that election to take place in time for new Council members to take their seats on or around August 16, 2019, the City would need to notice the election no later than April 8, 2019, which would mean a resolution from the Council by April 1, 2019. (Elec. Code, § 12101 [notice of election must be given at least 113 days before election date]; Vol. 5, Ex. GG, p. 1134, ¶ 3 [City Clerk explaining that the final Tuesday on which an election could take place with sufficient time for votes to be counted before August 15, 2019, is July 30, 2019].) Paragraph 9 thus requires the City to give notice of an election in a matter of weeks and then to hold a district-based election in July—which is exactly what is commanded by the expressly mandatory portion of the judgment that is unquestionably stayed.

Paragraph 9 is analogous to many injunctions entered in other cases that were prohibitory in form but mandatory in effect. In *Paramount Pictures Corp. v. Davis* (1964) 228 Cal.App.2d 827, for example, Paramount sued Bette Davis when she refused to film an additional scene for a movie. At the time, Davis was filming another movie under an exclusive contract with a different studio. The trial court prohibited Davis from filming any other movies until she filmed the additional scene for Paramount. Davis appealed and sought a writ of supersedeas. The Court of Appeal granted the writ, holding that "the injunctive order, although framed in prohibitory language, was intended to coerce or induce defendant into immediate affirmative action, i.e., to make the additional scene for Paramount." (*Id.* at p. 838.) Paragraph 9 puts the City in the same position as Davis, leaving it no choice but to

hold a district-based election—in other words, making mandatory the very act that the City has filed its appeal to avoid.

Similarly, in *Ambrose v. Alioto* (1944) 62 Cal.App.2d 680, the trial court prohibited the defendant "from delivering to Sun Harbor Packing Company, or to anyone other than Westgate Sea Products Co., any fish caught on any fishing voyage made by the vessel Dependable," notwithstanding a contract to deliver to Sun Harbor. (*Id.* at p. 681, internal quotation marks omitted.) The Court of Appeal held that this injunction was "but another means of stating that defendant must cease delivering to Sun Harbor Packing Company and must deliver fish to Westgate Sea Products Co.," and therefore was mandatory and automatically stayed pending appeal. (*Id.* at p. 686.)

Paragraph 9 is substantially similar to the challenged injunction in *Ambrose*: it is "but another means of stating" that the City must hold district-based elections in the short term. Just as the defendant-appellant in Ambrose could continue honoring the challenged contract and delivering fish to Sun Harbor during the appeal, so, too, should the current Council be able to remain seated throughout the pendency of the City's appeal. To demand otherwise would be to compel an affirmative act and a departure from the status quo. (*Ibid.*)

Davis and *Ambrose* are only two of the many cases in which California's appellate courts have reaffirmed the principle that substantively mandatory injunctions, even if prohibitory in form, are automatically stayed by operation of law for the duration of an

appeal. (E.g., *Garfield*, 18 Cal.2d at pp. 177–178; *Byington v. Superior Court of Stanislaus Cty.* (1939) 14 Cal.2d 68, 72; *Agricultural Labor Bd. v. Superior Court* (1983) 149 Cal.App.3d 709, 713; *Podesta v. Linden Irrigation Dist.* (1955) 132 Cal.App.2d 250, 261; *In re O'Connell* (1925) 75 Cal.App. 292, 298.)

Second, paragraph 9 is mandatory in effect because its enforcement would require the City to strip the seven current Council members of their titles and oust them from their duly elected positions. Courts have held that this sort of injunction is mandatory in character and therefore automatically stayed on appeal.

The Supreme Court's decision in *Clute v. Superior Court* (1908) 155 Cal. 15 is directly on point. There, the treasurer and manager of a corporation operating a hotel was ousted from his positions. In subsequent litigation over the legitimacy of that ouster, the trial court prohibited the erstwhile corporate officer from holding himself out as such or otherwise doing his job. He appealed and continued to do his job; the trial court held him in contempt. The Supreme Court reversed, holding that the injunction was mandatory, "though couched in terms of prohibition," because it impliedly required the former corporate officer to turn over the hotel and the personal property in it to someone else—it "compels him affirmatively to surrender a position which he holds . . . ." (*Id.* at p. 20.) Accordingly, the injunction was automatically stayed by the taking of an appeal, and "no contempt proceedings against him should have been entertained." (*Ibid.*) The same conclusion should follow here, as an order prohibiting a corporate officer from fulfilling his job duties is little different from the trial

court's order prohibiting Council members from serving after August 15.

The trial court's March 6, 2019, order, which declined to confirm the automatic stay of paragraph 9, contained no reasoning. Nonetheless, the trial court appears to have agreed with plaintiffs' effort to distinguish *Clute* on the ground that *Clute* involved disputed control over real property. Even if that were a valid distinction—and it is not, because the case concerned the surrender of an *office* as well as the surrender of property—the trial court failed to account for the many other cases (including those cited by the City) that had nothing to do with real property.

In *Feinberg v. Doe* (1939) 14 Cal.2d 24, for example, the Supreme Court held that an order prohibiting defendants from continuing to employ a particular non-union worker was mandatory because "[i]t, in effect, commands the defendants to release the said employee from their employment." (*Id.* at p. 29.) Here, similarly, the trial court's order requires the City to strip the current Council members of their seats.

The recent decision in *URS Corp. v. Atkinson/Walsh Joint Venture* (2017) 15 Cal.App.5th 872, another case not concerning disputed control over real property, holds that an order disqualifying a litigant's lawyer is automatically stayed on appeal. After the trial court denied a motion for stay pending appeal, the Court of Appeal granted a petition for a writ of supersedeas, holding that "[a]n order disqualifying an attorney from continuing to represent a party in ongoing litigation is a mandatory injunction because it requires affirmative acts that upset the status quo. . . ."

(*Id.* at p. 886.) Absent a stay, there was also serious risk of "mooting the appeal," insofar as the petitioner would "need to move on . . . and hire replacement counsel" and might choose not to pursue an independent appeal "because it will not make sense to reinsert [disqualified counsel] into the proceedings even if the order is reversed." (*Ibid*.)

Here, likewise, paragraph 9 would require the City to proceed with a district-based election whose animating premise and particulars (the district lines drawn by plaintiffs and adopted by the Court without public input and in violation of Elections Code section 10010) will be the very subject of the City's appeal. And although holding a district-based election during the appeal would not deprive this Court of jurisdiction, it would plainly moot the City's argument that it should not be compelled to hold any such an election *at any time*, not to mention any dispute over who should be seated on the Council during the pendency of the appeal. If seven new Council members were to assume those seats, and if the City prevails on appeal, there would be no turning back the clock; the City would have been governed by the wrong people, potentially for years.

D. There is no support for plaintiffs' contentions, and the trial court's implicit conclusion, that paragraph 9 is prohibitory in effect.

The trial court (although it offered no reasoning to support its decision) appears to have accepted one or more of plaintiffs' arguments as to why paragraph 9 is prohibitory in effect. None of them has merit.

First, the trial court may have improperly elevated form over substance, concluding that, by its terms, paragraph 9 does not call for the City to do anything at all after August 15. But plaintiffs admitted that paragraph 9, if enforced, would effect a *massive* change in the status quo: "Defendant could comply with paragraph 9 of the Judgment by holding a district-based election for the seats on its city council, or Defendant could opt to exist with no quorum on its city council"—that is, with no Council members at all. (Vol. 5, Ex. HH, p. 1162.) At the hearing on March 4, plaintiffs further suggested that if the City did nothing at all, the Governor might, under section 10300 of the Elections Code, appoint commissioners to call a district-based election. (See Vol. 5, Ex. II, pp. 1174, 1184.)

According to plaintiffs, then, paragraph 9 will result in district-based elections—the very relief, set out in paragraph 8 of the judgment, that is unquestionably stayed—or, in the (completely unrealistic) alternative, in the complete disbanding of the City's government. Whether paragraph 9 compels the City to hold a district-based election or to strip Council members of their seats and

somehow go without a governing body, the effect of "its enforcement would be to change the position of the parties and compel them to act in accordance with the judgment rendered"—the very essence of a mandatory injunction. (*Musicians Club*, *supra*, 165 Cal.App.2d at p. 71.)

Second, plaintiffs are wrong that "[w]here an injunction has both mandatory and prohibitory features, the prohibitory portions are not stayed *even if they have the effect of compelling compliance with the mandatory portions of the injunction*." (Vol. 5, Ex. HH, p. 1157.) This made-up rule flatly contradicts the long line of cases holding that if the effect of an injunction is to compel affirmative action, then its prohibitory form is irrelevant. (See, e.g., *Kettenhofen*, *supra*, 55 Cal.2d at p. 191; *Stewart v. Superior Court* (1893) 100 Cal. 543, 544–546; *URS Corp.*, *supra*, 15 Cal.App.5th at pp. 884–885.)

Further, plaintiffs' only support for their manufactured rule is *Ohaver v. Fenech* (1928) 206 Cal. 118, which they egregiously mischaracterize. Plaintiffs summarize that case with the following parenthetical: "injunction prohibiting the defendants from feeding garbage to their hogs was prohibitory in nature, and therefore not stayed by the subsequent appeal, even though the inevitable consequence of the injunction was to require the defendant to remove the hogs from their then-current location." (Vol. 5, Ex. HH, p. 1157.) But it was the argument of the losing litigant, *not the holding of the Supreme Court*, that the challenged injunction would inevitably require the appellant ranchers to move their hogs.

In response to that argument, the Court in *Ohaver* concluded that "[t]his does not necessarily follow. The appellants may feed their hogs other food" and therefore need not "make any change in the locality in which their hogs are kept." (206 Cal. at p. 123.) In other words, the injunction was truly prohibitory in nature, because it did not impliedly require the defendant to take any affirmative action. Here, by contrast, paragraph 9 *does* impliedly require affirmative action—the City must strip the Council members of their seats and hold a district-based election.

Third, the trial court may have erroneously accepted plaintiffs' contention that a statutory exception to the automatic-stay rule applies in this case. In particular, section 917.8 of the Code of Civil Procedure provides that there is no stay when "a party to the proceeding has been adjudged guilty of usurping, or intruding into, or unlawfully holding a public office, civil or military, within this state." The statute simply does not apply here.

Section 917.8's exception to the automatic-stay rule applies only to actions brought in *quo warranto* under section 803 of the Code of Civil Procedure—which is a special cause of action brought on behalf of the Attorney General to determine someone's right to hold a public office. The two sections are phrased in materially identical language.[2] And the California Supreme Court

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[2] Section 803 provides, in relevant part: "An action may be brought by the attorney-general . . . against any person who usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, . . . within this state."

has held that where, as here, an action was not brought in *quo warranto* and was instead a challenge to an election, section 917.8 (previously section 949) does not apply; as a result, "the perfecting of the appeal by the party aggrieved, *ipso facto*, operates as a *supersedeas*." (*Day v. Gunning* (1899) 125 Cal. 527, 530; see also *Anderson v. Browning* (1903) 140 Cal. 222, 223 [holding that "the certificate of election continues unimpaired during the pendency of the appeal"].) Legal treatises confirm this narrow construction of section 917.8: "Inasmuch as the language of [section 917.8] is similar to that contained in another statute authorizing an action in quo warranto for usurpation [section 803], it is apparent that the statutory exception under discussion refers *only* to actions of this character." (Cal. Jur. 3d, Appellate Review, § 412, italics added.)

In opposing the City's application for confirmation of the automatic stay, plaintiffs were unable to cite a single case applying section 917.8 or its predecessor to a context like this one, and instead argued that the current Council members are now "unlawfully" holding their seats under the terms of the statute. (Vol. 5, Ex. HH, pp. 1163–1165; Ex. II, pp. 1169–1196.) But *Day* expressly rejected such an argument, holding that "it cannot be said that the respondent is unlawfully holding his office" because "he *entered upon it lawfully* by virtue of his certificate of election. If, by matters arising after his incumbency, he has lost the right to retain the office"—such as, in this case, a judgment that the City's electoral system violates the CVRA, and that the current Council members elected under that system cannot continue to serve after

a specific date—"still it cannot be adjudged in this proceeding that he is usurping, intruding, or unlawfully holding office, within the intent and meaning of section 949." (125 Cal. at p. 529, italics added.) The word "unlawfully," then, is not some catch-all that must cover this case simply because plaintiffs say so. It is a term of art that applies specifically and solely in *quo warranto* proceedings.

And this, of course, is not a *quo warranto* proceeding. The trial court's judgment makes no reference to section 803 or the *quo warranto* remedy. But more importantly, this case was not brought directly by the Attorney General or by a relator authorized by the Attorney General. (See Code Civ. Proc., § 803; see also *Nicolopulos v. City of Lawndale* (2001) 91 Cal.App.4th 1221, 1228 [addressing circumstances under which private parties may serve as relators after applying for and receiving leave from the Attorney General to bring a *quo warranto* proceeding]; *Oakland Mun. Improvement League v. City of Oakland* (1972) 23 Cal.App.3d 165, 170 [cause of action for *quo warranto* "is vested in the People, and not in any individual or group"].) Under *Day*, then, section 917.8 does not and cannot apply.

Plaintiffs argued below that *Day* was no longer good law in light of the CVRA. Specifically, plaintiffs contended that the CVRA authorizes state courts to grant any remedy that a federal court might grant in a federal Voting Rights Act case, and that federal courts have the authority to order immediate elections. (Vol. 5, Ex. HH, p. 1165; Ex. II, pp. 1181–1182.) But that argument is entirely beside the point.

The question before the trial court, and now before this Court, is not whether the trial court had the remedial authority to order an immediate election or to prohibit Council members from serving after a certain date. The question, rather, is whether such an order was stayed automatically by operation of law or ought to be stayed in the exercise of judicial discretion. Federal voting rights decisions provide no guidance on the application of the automatic-stay rule, as there is no automatic stay of mandatory injunctions in federal court upon the taking of an appeal. (Wright & Miller, Injunction Pending Appeal, 11 Fed. Prac. & Proc. Civ. § 2904 (3d ed.).) And the CVRA neither displaced the case law concerning section 917.8 nor created a new exception to the automatic-stay rule.

E. In the alternative, the Court should exercise its discretion to issue the writ to prevent irreparable harm to the City and the public.

Even if the Court deems paragraph 9 to be prohibitory in effect as well as form, it should nevertheless exercise its discretion to issue the writ in order to prevent the City, its Council members, and the public from suffering irreparable harm. (*City of Pasadena*, *supra*, 75 Cal.App.2d at p. 98 ["Irrespective of whether an injunction is mandatory or prohibitory, this court has the inherent power to issue a writ of supersedeas if such action is necessary or proper to the complete exercise of its appellate jurisdiction [citations], and may issue the writ upon any conditions it deems just."]; see also, e.g., *Mills*, *supra*, 98 Cal.App.3d at p. 861 [issuing writ to avoid "irreparable injury" from repayment of fees collected

by a county planning department]; *Meyer v. Arsenault* (1974) 40 Cal.App.3d 986, 989 [issuing writ to avoid "irreparable injury" in the form of money that likely could not be recovered once paid]; *Wilkman v. Banks* (1953) 120 Cal.App.2d 521, 523 [issuing writ to avoid "irreparable damage" from the loss of "the fruits of a favorable determination on appeal if [appellants] were to be precluded in the meantime from continuing in their business of operating a sanitarium"].)

1. The City's appeal raises substantial issues, several of first impression

In evaluating the petition, the court should consider "the respective rights of the litigants," and accordingly "contemplate[] the possibility of an affirmative of the decree as well as of a reversal." (*Garfield*, *supra*, 18 Cal.2d at p. 177.) Here, there is a substantial likelihood of a reversal on one or more legal grounds, such that there is real risk that the City, the current Council members, and the public would suffer irreparable harm from the enforcement of paragraph 9 during the City's appeal. In entering a judgment in the plaintiffs' favor, the trial court erred in numerous respects, a few of which are briefly catalogued below.

a. The trial court erred in focusing exclusively on the performance of Latino candidates, ignoring the preferences of Latino voters.

To prevail on their CVRA claim, plaintiffs had to prove, among other things, legally significant racially polarized voting—

in this case, that Latino voters cohesively prefer certain candidates, and that those candidates are usually defeated as a result of white bloc voting. (*Gingles*, *supra*, 478 U.S. at pp. 49–51; see also Elec. Code, § 14026, subd. (e) [defining "racially polarized voting" by reference to federal case law].)

The first step in determining whether voting has been racially polarized is identifying the preferred candidates of the relevant minority group. (*Collins v. City of Norfolk* (4th Cir. 1989) 883 F.2d 1232, 1237 ["The proper identification of minority voters' 'representatives of . . . choice' is critical"].) The trial court erred by focusing exclusively on the performance of Latino (or Latino-surnamed) *candidates*, and ignoring the preferences of the Latino *voters* when they preferred candidates of other races. (See, e.g., Vol. 5, Ex. BB, pp. 1044–1045 [table showing regression results only for Latino or Latino-surnamed candidates in seven elections].)

Minority-preferred candidates need not themselves be members of the protected class, as courts have repeatedly held. (See, e.g., *Ruiz*, *supra*, 160 F.3d at p. 551 [joining eight other circuits "in rejecting the position that the 'minority's preferred candidate' must be a member of the racial minority"].) To indulge the presumption that voters always prefer candidates of their own race "would itself constitute invidious discrimination of the kind that the Voting Rights Act was enacted to eradicate, effectively disenfranchising every minority citizen who casts his or her vote for a non-minority candidate." (*Lewis v. Alamance Cty., N.C.* (4th Cir. 1996) 99 F.3d 600, 607; see also *NAACP, Inc. v. City of Niagara Falls, N.Y.* (2d Cir. 1995) 65 F.3d 1002, 1016 [such a ruling "would

project a bleak, if not hopeless, view of our society" and would "presuppose the inevitability of electoral apartheid"].) If the trial court had properly identified Latino-preferred candidates, in part by acknowledging that in multiple elections white candidates were preferred by Latino voters to an equal or greater extent than Latino candidates, there is no dispute that Latino-preferred candidates were not "usually" defeated.

To take but one example, in the 2008 Council election, a losing Latina-surnamed candidate, Linda Piera-Avila, is estimated to have received the support of just one-third of Santa Monica's Latino voters. (See Vol. 2, Ex. E, p. 313.) But two white candidates, Ken Genser and Richard Bloom, who both won, are each estimated to have received the support of half of Latino voters. (*Ibid.*) The trial court never accounted for the possibility that Latino voters may have legitimately preferred Mr. Genser and Mr. Bloom over Ms. Piera-Avila, or that voters prefer candidates for a variety of reasons having nothing to do with the candidates' race or ethnicity—such as the candidates' stances on the issues of interest to the voters.

The 2002 Council election showcases another flaw in the court's analysis. There, a losing Latina candidate, Josefina Aranda, is estimated to have received the support of 82.6% of Latino voters. (See *id.* at p. 312.) But Latino support for a winning white candidate, Kevin McKeown, was almost identical, at 76.8% (and may indeed have been higher, as there is substantial uncertainty in all of these estimates, which both parties' experts acknowl-

edged). (*Ibid.*) Even assuming for argument's sake that Ms. Aranda's defeat was one of the rare instances in which a Latino-preferred candidate did not prevail in Santa Monica elections, the trial court should not have disregarded the identically strong showing of Mr. McKeown simply because he is white.

When Latino-preferred candidates are counted accurately, and not on the basis of an erroneous and unconstitutional assumption that they must themselves be Latino (or Latino-surnamed), it becomes clear that those candidates prevail more often than not, contradicting the trial court's conclusion that Latino-preferred candidates usually lose. (Vol. 2, Ex. E, pp. 278–281, 311–315.) Because plaintiffs did not prove a legally significant pattern of racially polarized voting for this and other reasons, the trial court's judgment should be reversed.

b. The trial court erred in holding that plaintiffs proved vote dilution.

A public entity violates the CVRA only if its at-large method of election "*impairs* the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election, *as a result of the dilution* or the abridgment of the rights of voters who are members of a protected class." (Elec. Code, § 14027, italics added.) Courts interpreting similar language in § 2 of the federal Voting Rights Act require proof of *harm* (vote dilution) and *causation* (a connection between the harm and the electoral system). (E.g., *Gingles*, *supra*, 478 U.S. at 48, fn. 15; *Gonzalez v. Ariz.* (9th Cir. 2012) 677 F.3d 383, 405; *Aldasoro v.*

Kennerson (S.D.Cal. 1995) 922 F.Supp. 339, 369, fn. 10.) California courts have stated, but not yet held, that the CVRA similarly demands proof of vote dilution caused by an election system. (E.g., *Jauregui v. City of Palmdale* (2014) 226 Cal.App.4th 781, 802.)

To prove vote dilution, a plaintiff must show that a protected class would have greater opportunity to elect candidates of its choice under some other electoral system, which serves as a "benchmark" for comparison. (See, e.g., *Reno v. Bossier Parish Sch. Bd.* (1997) 520 U.S. 471, 480; *Holder v. Hall* (1994) 512 U.S. 874, 880 (plurality); *Gingles*, *supra*, 478 U.S. at 50, fn. 17.) "[I]n order to decide whether an electoral system has made it harder for minority voters to elect the candidates they prefer, a court must have an idea in mind of how hard it 'should' be for minority voters to elect their preferred candidates under an acceptable system." (*Gingles*, *supra*, 478 U.S. at 88 (conc. opn. of O'Connor, J.).)

Because Latino voters account for just 13.6 percent of the City's voting population and are dispersed throughout the City, they would comprise only 30 percent of the voting population in the purportedly remedial district ordered by the court. (See Vol. 2, Ex. E, p. 283; Ex. N, pp. 496–497.) Plaintiffs' expert on remedial effectiveness could not identify a single judicially created district in California or elsewhere in which the minority voting population was anywhere near that small. (*Ibid.*) And not only would the purportedly remedial district cure no ills, unrebutted testimony demonstrates that it would create new ones by diluting the voting strength of minority voters, including Latinos, outside of

that district. (*Ibid.*) This is particularly concerning given that two-thirds of the City's Latinos live *outside* the purportedly remedial district. (Vol. 4, Ex. X, pp. 799, 852.)

Because it is impossible, given the City's basic demographic facts, to prove that any other electoral system would give Latino voters the ability to elect candidates of their choice, the trial court's judgment should be reversed.

c. The trial court's holding renders the CVRA unconstitutional as applied to the facts of this case.

If, as plaintiffs have argued and the trial court's decision suggests, vote dilution is not an element of the CVRA, then the statute must be unconstitutional to the extent that it authorizes predominantly race-based remedies without a showing of any injury, much less a compelling governmental interest.

The United States Constitution forbids the imposition of any predominantly race-based remedy unless that remedy is narrowly tailored to serve a compelling governmental interest. (*Cooper v. Harris* (2017) 137 S.Ct. 1455, 1463–1464; *Shaw v. Hunt* (1996) 517 U.S. 899, 907–908.) Courts have assumed without deciding that governments have a compelling interest in remedying vote dilution. (*Cooper*, 137 S.Ct. at p. 1464.)

Here, the trial court has adopted a purportedly remedial district that was drawn, by the admission of plaintiffs' expert, to maximize the number of Latino voters within it, without any compelling justification for engaging in such race-based classifications. (E.g., Vol. 2, Ex. N, pp. 495–497; Vol. 4, Ex. X, pp. 858–

861.) There is no evidence of vote dilution: The districting plan approved by the trial court would not give Latinos within the purportedly remedial district the ability to elect candidates of their choice, and it would splinter two-thirds of the City's Latinos across six other districts, submerging them in overwhelmingly white districts. (See Vol. 2, Ex. E, pp. 283, 287; Ex. N, pp. 496–497.) There thus could not have been any lawful basis for the court to compel the City to adopt districts.

d. The trial court's judgment violates Elections Code section 10010.

The trial court rubber-stamped a districting plan drawn by plaintiffs' expert, without public input, in violation of section 10010 of the Elections Code. That statute requires that a city changing from an at-large method of election to district-based elections hold a series of public hearings over the boundaries of potential districts. Section 10010 expressly "applies to . . . a proposal that is required due to a court-imposed change from an at-large method of election to a district-based election." The court erred in refusing the City's repeated requests to follow the inclusive, democratic process of public engagement mandated by law. (E.g., Vol. 2, Ex. N, pp. 504–505; Vol. 4, Ex. X, pp. 775, 883–884.)

e. The trial court's findings are legally insufficient to demonstrate discriminatory impact or intent.

The trial court erred in concluding that plaintiffs had proven a violation of the Equal Protection Clause. To prevail on that claim, plaintiffs were obligated to demonstrate that the City's

at-large electoral system has caused a disparate impact that was intended by the relevant decisionmakers. (See *Rogers v. Lodge* (1982) 458 U.S. 613, 617; *Personnel Adm'r of Mass v. Feeney* (1979) 442 U.S. 256, 279.) Even if the facts found by the trial court were entirely correct—and they were not—those facts still would not remotely clear this high bar.

As an initial matter, plaintiffs submitted no evidence, and the court made no findings, demonstrating that the City's electoral system has caused any disparate impact—which must be proven with evidence that a protected class would have greater opportunity under some other method of election. (E.g., *Johnson v. DeSoto Cty. Bd. of Comm'rs* (11th Cir. 2000) 204 F.3d 1335, 1344.) No minority group, including Latinos, has ever accounted for a large percentage of the City's total population. (E.g., Vol. 4, Ex. X, pp. 76–77.) Plaintiffs did not prove, and the trial court did not find, that some alternative electoral system would have given any minority group the power to elect candidates of its choice at any time in the City's history. Accordingly, the fact that few Latinos have served on the Council—in addition to being irrelevant, as the question is whether *Latino-preferred* candidates have so served—says nothing about how many Latinos *should have* been elected to serve had Latinos voted cohesively throughout the City's history.

The facts found by the Court also do not support its conclusion of intentional discrimination. For example, the court acknowledged that the adoption of the City's current at-large elec-

toral system in the 1946 Charter was favored by prominent minority leaders and members of the local Committee on Interracial Progress (none of whom opposed the Charter). (Vol. 5, Ex. BB, p. 1078.) Yet the court nevertheless concluded that those who supported and adopted the Charter—which also contained an explicit *anti*-discrimination provision—were somehow motivated by an intent to discriminate *against* minorities. (See *id.*, pp. 1075, 1079.)

The trial court also inexplicably concluded that in 1946, proponents and opponents of the new Charter alike all understood "that at-large elections would diminish minorities' influence on elections." (Vol. 5, Ex. BB, p. 1080.) The reality is exactly the opposite. Plaintiffs could not identify a single member of any minority group in 1946 who (a) contended that at-large elections diminished minorities' influence on elections, (b) advocated for districted elections, or (c) opposed the new Charter. The opponents of the 1946 Charter were *not* calling for district-based elections—rather, they wanted to retain the status quo of a three-commissioner, designated-post system that was far less favorable to minorities. (Vol. 2, Ex. E, p. 293.) The local newspaper even published an article titled, "New Charter Aids Racial Minorities," which described a meeting with the local chapter of the NAACP, led by its chairman (who also publicly advocated for the new Charter), where it was pointed out that "the opportunity for representation in minority groups has been *increased* two and a half times over the present charter by expansion of the City Council from three to seven members." (Vol. 2, Ex. E, pp. 288, 327, italics

added.)

The trial court reached an equally outlandish conclusion in finding that the City Council decided in 1992 not to put district elections on the ballot because they were somehow intending to discriminate against minorities. Plaintiffs admit there is no evidence of racial animus on the part of the Council in 1992; in fact, the Council members consistently expressed a desire to *expand* minority representation. (Vol. 2, Ex. E, pp. 295, 335.) Plaintiffs' only argument about 1992, which the trial court accepted, was based on a single statement by a single Council member relating to preserving affordable housing. (Vol. 5, Ex. BB, p. 1083.) The City cannot find a single published decision grounding a weighty finding of intentional discrimination on anything so flimsy.

2. The City, its current Council members, and the public will be irreparably harmed without a stay.

If this Court ultimately reverses the judgment, then the enforcement of paragraph 9 during the pendency of the City's appeal will have worked irreparable harm on the City, its current Council members, and the public at large. Paragraph 9, if not stayed, will leave the City no choice but to immediately scrap its longstanding electoral system in favor of a district-based election scheme using the district maps drawn by plaintiffs' expert without any public input—the necessity and lawfulness of which are the very questions presented by this appeal. If this Court ultimately reverses on liability and/or remedy, then City and its voters will have gone

through an unnecessary and unlawful election process. The irreparable harms that will flow from that process include:

First, the current Council members will have lost much of the terms that they and their volunteers and financial supporters invested time and funds into winning.

Second, voters will have lost the representation of the candidates they preferred and elected. Notably, most of the City's current Council members were preferred by Latino voters. In the 2016 election, Tony Vazquez, one of two Latino-preferred candidates (see Vol. 2, Ex. E, p. 314), prevailed. He has since left the Council for a seat on the State Board of Equalization; the Council appointed Ana Jara, a Latina, to fill his seat for the balance of his term (until November 2020). (See Vol. 5, Ex. GG, pp. 1146, 1150-1152.) In the 2018 election, Latino voters' top three choices all won seats on the Council: Sue Himmelrich, Greg Morena, and Kevin McKeown. (See *id.* at p. 1142.)

Third, and relatedly, voters who elected the current Council members in 2016 and 2018 will have had their votes nullified—depriving these voters of their fundamental constitutional rights to have their voices heard in the electoral process. (Cal. Const., art. II, § 2.5 ["A voter who casts a vote in an election in accordance with the laws of this State shall have that vote counted"]; see also *United States v. City of Houston* (S.D. Tex. 1992) 800 F.Supp. 504, 506 ["When elections have been held—even under a voting scheme that does not technically comply with section 5 [of the Voting Rights Act]—the people have chosen their representatives. Neither the Justice Department nor this court should lightly overturn

the people's choices."].)

Fourth, the City will have paid the County almost $1 million for its assistance in providing computer records of voters' names and addresses, furnishing printed indices of voters to be used at polling places, and furnishing election equipment for a standalone election this summer. (Vol. 5, Ex. GG, pp. 1134, 1139.) That money will be unrecoverable.

Fifth, voters will have lost the electoral system that they have determined best suits their City, in part because it makes Council members accountable not just to a particular neighborhood, but to the City as a whole, and in part because it gives voters a say over every seat in elections held every two years, rather than a say over a single seat in elections held every four years. Santa Monica voters have twice overwhelmingly rejected proposals to abandon this system. (Vol. 2, Ex. E, pp. 294, 297.)

Sixth, if the City must hold an election before August 15, 2019, and if this Court later reverses the trial court's judgment, there would need to be yet *another* Council election for all seven Council members—which would be the third City Council election in a two-year span. In addition to the expenditure of time and resources by the City and the candidates, such a frequency of elections, under two entirely different schemes, would risk voter confusion and fatigue, and undermine voters' confidence in the electoral system.

3. Respondents' interests would not be harmed by a stay.

The City showed at trial why plaintiffs have not suffered

and will not suffer any harm from the continued maintenance of the current at-large election system. Latino-preferred candidates routinely get elected in Santa Monica. (Vol. 2, Ex. E, pp. 278–281.) And even if they did not, the City's Latino voters are too few in number and too dispersed throughout the City for any alternative electoral scheme, including districts, to give them the ability to elect candidates of their choice. (*Id.*, pp. 281–284.) Put simply, there is no wrong to right in this case.

Even if the City's basic demographic facts were different, and even if it were possible to create a district in which Latino voters could elect candidates of their choice, there still would be no prospect of real harm here. As noted above, the current Council members, who were elected in the 2016 and 2018 elections, were almost all preferred by Latino voters. Accordingly, removing this Council would, if anything, *harm* the interests of Latino voters, who would lose the benefit of the very representation they themselves sought at the polls, in favor of a brand-new election system that would threaten to dilute the voting power of Latinos citywide by fracturing their votes across seven districts. (E.g., Vol. 2, Ex. N, p. 496; cf. Phil Willon, A Voting Law Meant to Increase Minority Representation has Generated Many More Lawsuits than Seats for People of Color (L.A. Times, Apr. 7, 2017) ["The threat of legal action has forced cities to switch to council districts, but in some cases the move hasn't resulted in more minority representation because the city already is well-integrated and drawing districts where minorities predominate is difficult."].)

Finally, to the extent plaintiffs would suffer any harm at all

from a stay of paragraph 9, it would necessarily be of a short duration—the time required to dispose of this appeal. If the City is wrong, and the judgment is affirmed, the at-large election system will no longer be used to elect City Council members. But if the City is correct, and the judgment is reversed, the City and its voters will have incurred massive expenses and endured a great deal of disruption and uncertainty for no reason. The prospect of multiple elections, as well as uncertainty as to who will make decisions on the City's behalf even a few months hence, will interfere with the City's ability to govern itself.

In sum, even if plaintiffs might suffer any harm from a stay, it does not remotely compare with the harms the City and its voters will certainly suffer absent a stay.

VI. CONCLUSION

For these reasons, this Court should grant the City's petition for a writ of supersedeas, and it should confirm that paragraph 9 of the trial court's judgment is mandatory in effect, and thus automatically stayed during the pendency of the City's appeal. In the alternative, this Court should stay the enforcement of paragraph 9 of the trial court's judgment until the final resolution of this appeal.

DATED: March 8, 2019

Respectfully submitted,

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CERTIFICATION OF WORD COUNT

Pursuant to rules 8.204(c)(1) and 8.486(a)(6) of the California Rules of Court, the undersigned hereby certifies that this petition and the accompanying memorandum contain 13,227 words, as counted by the Microsoft Word word-processing program, excluding the tables, this certificate, the verification, and the signature blocks.

DATED: March 8, 2019

Kahn A. Scolnick